Mohamad Rambli bin Kawi v Superintendant of Lands Kuching & Anor

HIGH COURT (KUCHING) — NO 22–84 OF 2002-III(II)
DAVID WONG J
21 JANUARY 2010

Evidence — Hearsay — Effect of admission of hearsay evidence — Whether hearsay evidence relevant in a claim for NCR

Native Law and Custom — Land dispute — Customary rights over land — Native customary land acquired via letters of surrender — Proof of native customary rights over land — Whether plaintiff proved NCR in his land — Whether s 5(3) and (4) of the Sarawak Land Code unconstitutional — Whether members of Malay communities can transfer NCR in land to members of same communities — Whether plaintiff entitled to exemplary or aggravated damages — Sarawak Land Code s 5(3) & (4) — Federal Constitution arts 13(2) & 160(2)

The plaintiff, who was of the Malay race and by virtue of the law was considered a native of Sarawak, had acquired 51 parcels of land totalling approximately 547.49 acres from the descendants of original owners of native customary lands ('NCL'). Although no title deeds had been issued for the 51 parcels of land, the plaintiff had in his possession 47 letters of surrender of NCL ('the letters of surrender') signed between the present owners of the said parcels of land and the plaintiff in consideration of certain sums of money. All native customary rights ('NCR') claimed over the 51 parcels of land were extinguished by the Land (Extinguishment of Native Customary Rights) (No 105) Direction 1999 ('the Direction'), made under s 5(3) and (4) of the Sarawak Land Code ('the Code'), and the land held under such rights was to revert to the Government of Sarawak. The plaintiff had within the prescribed time of 60 days from the Direction lodged his claim but it was rejected by the first defendant via a letter dated 24 April 2002. The plaintiff therefore commenced this action seeking, inter alia, a declaration that he had acquired NCR over the 51 parcels of land, a declaration that s 5(3) and (4) of the Code were unconstitutional and general, aggravated and exemplary damages against the defendants. The defendants disputed the claims on the grounds that the plaintiff had not proved on the balance of probability that he had acquired NCR over the 51 parcels of land. The plaintiff testified that after checking with the late Penghulu Sadam bin Hashim (the late penghulu who had jurisdiction over the 51 parcels of land) that the lands were in fact NCL,

he had approached the rightful proprietors of the said NCL with the late penghulu's son, who was then a councilor of the district council, and obtained from them the letters of surrender, which were the proper forms for the surrendering and transferring of NCR amongst the natives in Sarawak. The plaintiff's evidence as to the Malay practice of 'cari makan' and 'serah' in claiming NCR and transferring NCL to fellow natives was substantially corroborated by the late penghulu's son, the present penghulu. The plaintiff's evidence as to the customary practices of the Malays was further corroborated by one Sebi bin Masran ('Sebi'), a penghulu for the period 1 June 1980–31 December 2008. The first defendant rejected the claims of NCR of the plaintiff. The defendants submitted that there was no evidence in court that the alleged Malay customary practice of 'cari makan' and 'serah' had been given legal effect by the laws of Sarawak since there were no written laws to this effect. The defendant also attacked the plaintiff's evidence as hearsay evidence on the grounds that the present owners of the 51 parcels of land had not created any rights to the land.

Held, allowing the plaintiff's application with costs:

(1) The correct approach in dealing with proof of NCR is to examine the evidence to determine whether the original claimants possessed NCR over the 51 parcels of land. In so doing it would be necessary to examine the customs and practices of the Malays in that area in which the plaintiff was claiming NCR. In determining the customs the phrase 'law of Sarawak' cannot only mean written law but also common law as developed by the courts from time to time. Apart from the common law, the Federal Constitution accords recognition to NCR. There was no formal record of the practice of 'cari makan' and what the court was confronted with was the oral evidence of the witnesses. The evidence of the plaintiff and the witnesses who had surrendered their NCLs to the plaintiff was self-serving and their corroborative value of this evidence was limited. However, the evidence of the late penghulu's son, the present penghulu, who had no interest in the outcome of the case confirmed that the plaintiff had executed the letters of surrender with the owners of NCL and thus confirmed the plaintiff's ownership of the NCL. No evidence was produced by the defendants to rebut such contention. The late Penghulu's son further confirmed that the Malay practice of 'cari makan' was a Malay custom and although he did not claim to be an expert witness his claimed knowledge had not been disputed by the defendant and was thus unchallenged. The evidence of Sebi, an independent witness also confirmed the plaintiff's evidence. As such the plaintiff had on the balance of probabilities proved that the 51 parcels of land were NCL acquired via letters of surrender (see p 17 last paras 28, 31, 33–34, 36–37 & 39).

(2) Although the defendant had attacked the plaintiff's evidence as hearsay,

nevertheless hearsay evidence and opinion evidence are relevant evidence in a claim for NCR. In dealing with NCR it ought to be noted that these rights pre-existed any legislation because the persons to whom these rights belonged to were not only the owners, they were also part of the land (see paras 40–41).

(3) As the law of Sarawak provides for compensation to be paid when there is an extinguishment of NCR, s 5(3) of the Code did not contravene the protection accorded by art 13(2) of the Federal Constitution. Further art 160(2) defines law to include 'customs or usage having the force of law in the Federation or any part thereof' while art 153 grants special status to the Malays and the natives of Sabah and Sarawak. As such the Federal Constitution gives protection to NCR (see paras 47 & 49).

(4) There is no reason why natives should not possess such rights of disposition of their NCL as non-natives have in titled land. Not to allow such disposition among their own communities would in effect make the NCL worthless. Thus natives in Sarawak may dispose their NCL for value among the natives themselves provided there was no prohibition to do so in the custom of that native community. In the present case there was no such prohibition proved. Instead on the contrary there was ample evidence to support the customary practice of 'serah' as part of the Malay culture (see paras 51 & 56).

(5) The plaintiff had not shown that the defendants had conducted themselves in such a manner that required an award of exemplary or aggravated damages (see para 60).

[Bahasa Malaysia summary

Plaintif, yang berbangsa Melayu dan menurut undang-undang dianggap anak negeri Sarawak, telah memperoleh 51 bidang tanah yang meliputi lebih kurang 547.49 ekar daripada keturunan pemilik-pemilik asal tanah adat anak negeri ('TAAN'). Meskipun tiada surat ikatan hak milik telah dikeluarkan untuk 51 bidang tanah tersebut, plaintif mempunyai dalam milikannya 47 surat-surat penyerahan TAAN ('surat-surat penyerahan tersebut') yang ditandatangani antara pemilik-pemilik bidang tanah tersebut yang sedia ada dan plaintif sebagai balasan untuk sejumlah wang tertentu. Kesemua hak-hak adat anak negeri ('HAAN') yang dituntut ke atas 51 bidang tanah itu telah dilupuskan oleh Arahan Tanah (Pelupusan Hak-Hak Adat Anak Negeri) (No 105) 1999 ('Arahan tersebut'), yang dibuat di bawah s 5(3) dan (4) Kanun Tanah Sarawak ('Kanun tersebut'), dan tanah yang dipegang di bawah hak-hak sebegini hendaklah dikembalikan kepada Kerajaan Sarawak. Plaintif telah membuat tuntutannya dalam tempoh masa 60 hari yang ditetapkan daripada Arahan tersebut tetapi ia telah ditolak oleh defendan pertama melalui surat 24 April 2002. Plaintif dengan itu telah memulakan tindakan

ini memohon, antara lain, satu deklarasi bahawa dia telah memperoleh HAAN ke atas 51 bidang tanah tersebut, satu deklarasi bahawa s 5(3) dan (4) Kanun tersebut tidak berperlembagaan dan ganti rugi am, teruk dan tauladan terhadap defendan-defendan. Defendan-defendan telah mempertikaikan tuntutan-tuntutan itu atas alasan-alasan bahawa plaintif tidak membuktikan atas imbangan kebarangkalian bahawa si akan memperoleh HAAN ke atas 51 bidang tanah tersebut. Plaintif telah memberikan keterangan bahawa setelah memeriksa arwah Penghulu Sadam bin Hashim (arwah penghulu yang mempunyai bidang kuasa ke atas 51 bidang tanah itu) bahawa tanah-tanah tersebut pada hakikatnya merupakan TAAN, dia telah berjumpa dengan tuan punya sebenar TAAN tersebut bersama dengan anak lelaki arwah penghulu, yang pada masa itu ahli Majlis Daerah, dan daripada mereka diperoleh surat-surat penyerahan tersebut, yang merupakan borang-borang yang betul untuk menyerah dan memindah milik HAAN di kalangan anak watan di Sarawak. Keterangan plaintif berhubung amalan Melayu tentang 'cari makan' dan 'serah' dalam menuntut HAAN dan memindah milik TAAN kepada anak watan telah disokong sepenuhnya oleh anak lelaki arwah penghulu, penghulu sekarang. Keterangan plaintif berhubung amalan-amalan mengikut adat orang Melayu selanjutnya telah disokong oleh Sebi bin Masran ('Sebi'), seorang penghulu untuk tempoh 1 Jun 1980 hingga 31 Disember 2008. Defendan pertama telah menolak tuntutan-tuntutan HAAN plaintif. Defendan-defendan telah menghujahkan bahawa tiada keterangan dalam mahkamah yang mengatakan amalan adat orang Melayu tentang 'cari makan' dan 'serah' telah diberikan kesan undang-undang oleh undang-undang Sarawak memandangkan tiada undang-undang bertulis sewajarnya. Defendan juga membidas keterangan plaintif sebagai keterangan dengar cakap atas alasan-alasan bahawa pemilik-pemilik 51 bidang tanah kini tidak membentuk apa-apa hak ke atas tanah tersebut.

Diputuskan, membenarkan permohonan plaintif dengan kos:

(1) Pendekatan sebenar apabila membicarakan tentang bukti HAAN adalah dengan meneliti keterangan untuk menentukan sama ada penuntut-penuntut asal memiliki HAAN ke atas 51 bidang tanah tersebut. Dengan berbuat demikian adalah perlu untuk meneliti adat-adat dan amalan-amalan orang Melayu di kawasan tersebut yang mana plaintif membuat tuntutan HAAN. Dalam menentukan adat-adat istilah 'law of Sarawak' tidak hanya bermaksud undang-undang bertulis tetapi juga *common law* sepertimana yang diperkembangkan oleh mahkamah dari masa ke semasa. Selain daripada *common law*, Perlembagaan Persekutuan memberikan pengiktirafan kepada HAAN. Tidak ada rekod rasmi tentang amalan 'cari makan' dan apa yang mahkamah berhadapan dengan adalah keterangan lisan saksi-saksi. Keterangan plaintif dan saksi-saksi yang menyerahkan TAAN mereka kepada plaintif adalah dengan sendirinya dan nilai

A sokongannya terhadap keterangan ini adalah terhad. Walau bagaimanapun, keterangan anak lelaki arwah penghulu itu, penghulu sekarang ini, yang tiada kepentingan dalam keputusan kes itu mengesahkan bahawa plaintif telah menyempurnakan surat-surat penyerahan dengan pemilik-pemilik TAAN itu dan dengan itu B mengesahkan pemilikan plaintif ke atas TAAN itu. Tiada keterangan telah dikemukakan oleh defendan-defendan untuk mencabar hujah sedemikian. Anak lelaki arwah penghulu selanjutnya mengesahkan bahawa amalan orang Melayu 'cari makan' merupakan adat orang Melayu dan meskipun dia tidak mendakwa dirinya sebagai saksi pakar C namun dakwaan tentang pengetahuannya tidak boleh dipertikaikan oleh defendan dan dengan itu tidak dicabar. Keterangan Sebi, saksi berasingan juga mengesahkan keterangan plaintif. Oleh itu plaintif telah membuktikan atas imbangan kebarangkalian bahawa 51 bidang D tanah adalah TAAN yang diperoleh melalui surat-surat penyerahan (lihat perenggan 28, 31, 33–34, 36–37 & 39).

(2) Meskipun defendan telah membidas keterangan plaintif sebagai dengar cakap, namun begitu keterangan dengar cakap dan keterangan pendapat adalah keterangan yang relevan dalam tuntutan untuk E HAAN. Apabila berurusan dengan HAAN ia patut diberi perhatian bahawa hak-hak tersebut wujud terlebih dahulu daripada mana-mana perundangan kerana mereka yang memiliki hak-hak tersebut bukan sahaja pemilik-pemilik, mereka juga sebahagian daripada tanah itu (lihat perenggan 40–41).

F

(3) Memandangkan undang-undang Sarawak memperuntukkan agar pampasan perlu dibayar apabila terdapat pelupusan HAAN, s 5(3) Kanun tersebut tidak melanggar perlindungan yang diberikan oleh perkara 13(2) Perlembagaan Persekutuan. Selanjutnya perkara 160(2) G mentafsirkan undang-undang untuk memasukkan 'customs or usage having the force of law in the Federation or any part thereof' manakala perkara 153 memberikan status istimewa kepada orang Melayu dan anak negeri Sabah dan Sarawak. Oleh itu Perlembagaan Persekutuan memberikan perlindungan untuk HAAN (lihat perenggan 47 & 49).

H

(4) Tiada alasan kenapa anak negeri tidak patut memiliki hak-hak pelupusan TAAN mereka kerana mereka yang bukan anak negeri mempunyai tanah yang mempunyai hak milik. Dengan tidak membenarkan pelupusan sedemikian di kalangan masyarakat mereka I sendiri akan menjadikan TAAN itu tidak berharga. Oleh itu anak negeri Sarawak boleh melupuskan TAAN mereka untuk nilai di kalangan anak negeri sendiri dengan syarat tiada larangan untuk berbuat demikian dalam adat masyarakat anak negeri. Dalam kes ini tiada larangan sedemikian dibuktikan. Sebaliknya bertentangan

terdapat keterangan yang mencukupi untuk menyokong amalan mengikut adat 'serah' sebagai sebahagian daripada budaya orang Melayu (lihat perenggan 51 & 56).

(5) Plaintif tidak menunjukkan bahawa defendan-defendan telah berkelakuan dalam cara tertentu sehingga memerlukan award untuk ganti rugi tauladan atau teruk (lihat perenggan 60).]

Notes

For cases on customary rights over land, see 10 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 655–664.

For cases on effect of admission of hearsay evidence, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1744–1745.

Cases referred to

Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor [1997] 1 MLJ 418, HC (refd)

Bato Bagi & Ors v Government of the State of Sarawak [2008] 5 MLJ 547, HC (refd)

Bisi AK Jinggot @ Hilarion Bisi AK Jenggut v Superintendent of Lands & Surveys Kuching Division & Ors [2008] 4 MLJ 415; [2008] 1 LNS 245, HC (refd)

Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1993] 3 MLJ 352; [1994] 1 CLJ 19, HC (refd)

Delgamuukw v British Columbia [1997] 3 SCR 1010, SC (refd)

Hamit bin Matusin & Ors v Superintendent of Lands & Surveys & Anor [1991] 2 CLJ 1524, HC (refd)

Hj Khalid bin Abdullah v Khalid bin Abg Hj Marzuki & Anor (Kuching Originating Motion No KG3 of 1983) (refd)

Jalang Anak Paran & Anor v Government of the State of Sarawak & Anor [2007] 1 MLJ 412; [2007] 1 AMR 39, HC (refd)

Karthiyayani & Anor v Lee Leong Sin & Anor [1975] 1 MLJ 119, FC (refd)

Mason v Tritton (1994) 34 NSWLR 572, CA (folld)

Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors [2001] 6 MLJ 241, HC (refd)

Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors [2002] 2 MLJ 591; [2002] 2 CLJ 543, HC (refd)

Sapiah binti Mahmud (f) v Superintendent of Lands and Surveys, Samarahan Division & 2 Ors [2009] MLJU 410, HC (refd)

Sumbang Anak Sekam v Engkarong Anak Ajah [236] MD 10; [1958] SCR 95 (not folld)

Superintendent of Lands & Surveys Miri Division & Anor v Madeli bin Salleh (suing as the administrator of the estate of the deceased, Salleh bin Kilong) [2008] 2 MLJ 677; [2007] 6 CLJ 509, FC (refd)

Legislation referred to

Federal Constitution arts 13, 13(2), 153, 160(2)
Land (Extinguishment of Native Customary Rights) Direction 1999
Sarawak Land Code 1958 (Cap 81) ss 2, 2(a), 5(1), (2), (3), (4)

See Chee How (Baru Bian & Co Advocates) for the plaintiff.
Kenzia Norella Daim (Fam Boon Kim, Sabwati Balia and Joseph Chioh with her) (State Legal Officers, Sarawak) for the defendants.

David Wong J:

PROCEEDINGS

[1] The plaintiff seeks the following reliefs:

(a) a declaration that the plaintiff has acquired native customary rights (NCR) over 51 parcels of land;

(b) a declaration that this right precludes the first and second defendants from impairing or abridging the plaintiff's rights;

(c) a declaration that s 5(3) and (4) of the Land Code (Cap 81) Sarawak, is unconstitutional;

(d) further and/or in the alternative for a declaration that the letter dated 24 April 2002 (the said rejection letter) in referring the plaintiff's claims to an arbitrator is null and void;

(e) general, aggravated damages and exemplary damages against the defendants to be assessed;

(f) interest to be charged on the said amount of damages at the rate of 8%pa from the date of extinguishment notice to date of judgment and realisation;

(g) any other orders or reliefs this honourable court deems fit and just; and

(h) costs of this action.

[2] The defendants dispute the claims on the ground that the plaintiff had not proved on the balance of probability that he had acquired native customary rights on the 51 parcels of land.

ISSUES

[3] Having heard the evidence and read the submissions of counsel, I agree

that the issues in this case are as set out by counsel for the defendants and they are as follows:

(a) Whether s 5(3) and (4) of the Land Code, is unconstitutional?

(b) Whether the plaintiff had acquired native customary rights over the 51 parcels of land or any part thereof?

(c) Whether, in the circumstances, the first defendant was right in law to reject the plaintiff's claims to NCR over 51 parcels of land or any part thereof?

(d) Whether the plaintiff is entitled to aggravated and exemplary damages?

BACKGROUND

[4] The plaintiff had acquired native customary rights over 51 parcels of land totaling approximately 547.49 acres at Loba Rambungan, Kuching by virtue of 'forty-seven (47) Surat Perjanjian Menyerah Tanah Temuda ('NCR') or Letters of Surrendering Native Customary Land' signed between the plaintiff and the 'respective original owners' in consideration of 'certain sums or monies'. It is not disputed that the plaintiff did not acquire the 51 parcels of land from the original claimants of NCR but from their descendants. No title deeds had been issued for the 51 parcels of land. By the Land (Extinguishment of Native Customary Rights) (Loba Rambungan Area) (No 105) Direction 1999 ('the Direction'), dated 18 September 1999 (see p 90 of exh A), made by the Minister for Planning and Resource Management under s 5(3) and (4) of the Land Code (Cap 81), upon the coming into force of the Direction, 'all native customary rights that may be claimed or have subsisted over the land situated along Loba Rambungan and Sungai Selang Rambungan, Kuching, and the said land held under such rights shall revert to the Government of Sarawak'. The 51 parcels of land came within the Direction; hence all NCRs therein had been extinguished by it. The plaintiff had within the prescribed time of 60 days from the Direction lodged his claim but it was rejected by the first defendant via a letter dated 24 April 2002.

ISSUE NO 1

Whether s 5(3) and (4) of the Land Code, is unconstitutional?

[5] I have dealt with this issue in the case of *Jalang Anak Paran & Anor v Government of the State of Sarawak & Anor* [2007] 1 MLJ 412 where I held at p 423:

[12] The rationale therefore is where there is legislation for extinguishment of native customary rights, so long as there is payment of adequate compensation; the said legislation is safe from constitutional attack. For reasons stated above, I hold that s 5(3) and (4) of the Sarawak Land Code do not violate art 5 of the Federal Constitution and hence a valid piece of legislation.

[6] I have no reason to depart from my earlier view. In fact Dato' Abdul Aziz J in a later case of *Bato Bagi & Ors v Government of the State of Sarawak* [2008] 5 MLJ 547, saw fit to agree with my view where he stated that 'though the common law respects the pre-existence of rights under native laws and customs, such rights may be taken away by clear and unambiguous words'.

[7] Accordingly, I reject this contention of unconstitutionality.

ISSUE NO 2

Whether the plaintiff had acquired native customary rights over the 51 parcels of land or any part thereof?

[8] There are two sub issues here, as follows:

(a) Whether the plaintiff had proved that the sellers who had surrendered their land via 'Surat Perjanjian Menyerah Tanah Temuda' to the plaintiff had native customary rights in the 51 parcels of land?

(b) If the answer to sub issue (a) is in the affirmative, whether the plaintiff could have acquired the NCR in the 51 parcels of land by way of 'Serah'?

THE PLAINTIFF'S CASE

[9] The crux of the plaintiff's case can be seen from the testimony of the plaintiff ('PW1') himself and they are contained in his statements — PW1A, PW1B, PW1C and PW1D. In brief they are these. The plaintiff is of the Malay race and by virtue of the law he is considered a native of Sarawak. In 1987 after his parcels of land were acquired by the state government, he made enquiry with the villagers of Kampung Loba as to the status of the land in Loba Rambungan with the intention of cultivating them. He was informed that those lands were owned by some families of Kampung Loba by virtue of their claim of native customary rights over them. He was also informed that some of the villagers were willing to surrender their native customary lands ('NCL') to him for a consideration. The plaintiff was keen on those NCL as he knew that there would be road access to them as his parcels of land which were near to Loba Rambungan were acquired by the state government for road construction. He then commissioned one late Mustapha bin Leman to

demarcate the 51 parcels of land, marked in exhs P2 and P3. Between 1987 and 1989, the plaintiff made numerous trips to Kampung Loba to check on who were willing to surrender their NCL to him. At the end of 1990, the plaintiff had succeeded in obtaining 47 sets of 'Surat Perjanjian Menyerah Tanah Temuda (NCR)' together with relevant annexure locality plan which, in the plaintiff's view, in effect gave him ownership of the 51 parcels of land.

[10] To ensure that the 47 sets of 'Surat Perjanjian Menyerah Tanah Temuda (NCR)' are in order the plaintiff had approached the late Penghulu Sadam bin Hashim who had jurisdiction over the land in Loba Rambungan to check whether the 51 parcels of land were in fact NCL and owned by the villagers. He was told by Penghulu Sadam that the villagers in Kampung Loba have native customary rights over the Loba Rambungan land and was also told to see the late Ketua Kaum Bujang bin Hassan together with Penghulu Sadam's son Mahlee @ Mahli bin Sadam ('PW2') to check who the proprietors of the respective lands were. PW2 was then a councilor of Padawan Rural District Council. The plaintiff, together with PW2, did consult Ketua Kaum Bujang as to who were the rightful proprietors of the NCL. After such consultation the 47 'Surat Perjanjian Menyerah Tanah Temuda (NCR)' were signed by the plaintiff and the respective proprietors before the late Ketua Kaum Bujang. The plaintiff also testified that the 'Surat Perjanjian Menyerah Tanah Temuda (NCR)' forms were obtained from the Lands and Surveys Department and was also told that those were the proper forms for the surrendering and transferring of NCR land amongst the natives in Sarawak.

[11] It is also the plaintiff's assertion that it is a Malay customary practice that the first person that occupy an area for dwelling, farming or generally for 'cari makan' would have a claim of native customary rights over the land and those rights can be inherited by his or her children or relatives and can be transferred to another native. It is also his assertion that the Malay race recognises the practice of 'serah' in surrendering their land. This assertion is made based on his own experience and the recognition by the penghulu or ketua adat of the Malay community. He was able to produce numerous sets of 'Surat Perjanjian Menyerah Tanah Temuda (NCR)' in court involving his land in which the state government had, by implication, accepted the practice by paying him compensation. He also relied on the paper written by the late James Jabing named 'A paper on the concept of serah over native customary land in the context of the statute law and adat'.

[12] The plaintiff's evidence is substantially corroborated by PW2. Like his father and grandfather PW2 was appointed a penghulu by the resident of Kuching division for the period between 1995–2002 having jurisdiction over numerous villages including Kampung Telaga Air, Kampung Trombol,

Kampung Loba, Kampung Selang Kandong, Kampung Sibu Laut and Kampung Loba Cermin, succeeding his late father Sadam bin Hashim who passed away in 1991. PW2 served as the acting penghulu after his father's demise while awaiting the formal appointment by the resident.

[13] As a penghulu, PW2's duties among others include:

(a) representing the villagers under his jurisdiction at any official meetings or functions organised by the government of the day;

(b) administering and implementing government projects and policies within his area of jurisdiction; and

(c) to preside over disputes or cases coming before the native court pertaining to the Malay community.

[14] PW2's testimony basically confirmed the Malay practice of 'cari makan' and 'serah' in claiming native customary rights and transferring NCL to fellow natives. He based his assertion of such Malay customs on his wide experiences and knowledge acquired from his father and his status as penghulu. He had also attended numerous seminars organised by the resident's office and lands and survey on NCR land issues among the natives including Malay. He also has many relatives living in Kampung Loba, hence has personal knowledge of the Kampung. As far as Kampung Loba is concerned, there are a lot of 'bako' trees which are cut and sold to charcoal kilns.

[15] He also confirmed that the plaintiff had employed the late Mustapha bin Leman to demarcate the 51 parcels of land and visited his father many times concerning those lands.

[16] The plaintiff also called two of the 'sellers' ie Awang Jamain bin Awang Sharom ('PW3') and Hazmi @ Muhaili bin Hassan, farmer cum fisherman ('PW4') to testify their claims to their NCL. Both witnesses were born and live in Kampung Loba and had inherited the NCL from their relatives. Both also testified that land rights for the Malay were acquired and created via the customary practice of 'cari makan' and 'serah'.

[17] As an independent corroboration of his evidence, the plaintiff called one Sebi bin Masran ('PW5') to testify on the customary practice of the Malays. PW5 was appointed a penghulu for the period 1 June 1980–31 December 2008 and has no interest or connection in this case as his jurisdiction was over the Malay communities in Kampung Sejingkat, Tg Bako and Kampung Muhibbah, Seberang Pending, Sepakat Jaya and Pingan Jaya. It is his testimony that he is very familiar with the customary practice

of the Malay communities in Kuching area. This familiarity stems from his own personal experience as a Malay, attending many briefings organised by the various government departments and through his work as penghulu where he had been asked to resolve disputes on land matters among the Malays. It is his testimony that according to the Malay *adat* or customs, the pioneers or the first person that occupy an area for farming or planting of crops or fruit trees or generally for 'cari makan' (foraging the land for food or general use of the land for livelihood) would have a claim or right over the said land. After his death, any of his children may inherit the right over the said parcel of land, which is commonly referred to as NCL. This is because that land was acquired by virtue of their Malay native custom. Such rights created and or acquired over the NCL may be 'serah' (surrendered or transferred) to another person or another native who may not be Malay by race but a native of Sarawak.

[18] Therefore the Malay NCL, which includes the swampy areas and the riverbanks where they had planted upon and foraged for food are not just sources of their livelihood but also constitutes life itself as the land is also fundamental to the Malays' social, cultural and spiritual aspects as natives of Sarawak.

[19] The rivers and streams in the vicinity of the Malay villages are also significant to the villagers because fishing is most common and in many localities, such as Sejingkat and Tanjung Bako, the rivers, streams and the sea were the only means of accessibility to the outside world.

[20] In cross-examination, PW5 testified that although he is not an expert, he knows the customs and customary practice of his community. After being appointed as a penghulu in 1980, he has been adjudicating and resolving matters concerning the Malay community, particularly amongst members of the Malay community in the area of his jurisdiction.

[21] PW5 also testified that he has knowledge of the 'Surat Perjanjian Menyerah Tanah Temuda', that the same is used when a party surrenders and or transfers his or her customary rights over his or her native customary land to another native person. He testified that it is a requirement of the Lands & Surveys Department that such 'Surat Perjanjian Menyerah Tanah Temuda' must be signed by the penghulu as the ketua adat of the area to verify and confirm the existence of customary rights of the 'Penyerah' (transferor).

[22] It was the evidence of PW5 that in or about 1993, the state government had acquired lands in and around Sungai Tapang, Sejingkat for the establishment and or creation of the Sejingkat free trade zone industrial estate. In his capacity as the penghulu, he was requested and had rendered his

service to assist the Lands & Surveys Department in determining the proprietors and owners of the native customary land to ensure that compensation monies were paid to the rightful persons.

[23] PW5 confirmed and verified that the 'Surat Perjanjian Menyerah Tanah Temuda' was one of the documents which he relied on to ascertain the rightful claimants' are the proprietors and owners of the native customary land. It is within his knowledge that the 'Surat Perjanjian Menyerah Tanah Temuda' forms had been accepted by the Lands & Surveys Department.

THE DEFENDANT'S CASE

[24] In rebutting the plaintiff's case, the defence called two witnesses. The first witness DW1 (Charles Arthur Bateman, retired government servant) was the Superintendent of Lands and Surveys, Kuching Division who had rejected the claims of native customary rights of the plaintiff. His reasons for rejecting the plaintiff's claims are contained in para 8 of his witness statement and I quote in verbatim:

1. The area under cultivation as at 1948 and 1876 disclosed only 17.818 hectares which does not supported the claim of the plaintiff for land of 600 acres in size;
2. Penghulu Mahli Sadam who holds an identity card 500203-13-5409 implied that he was born in 1950 but has allegedly known the plaintiff for 20 years. In this case, I have reasonable doubt that the Penghulu knew anything about the alleged creation of native customary rights before he was born;
3. Other than this evidence, the plaintiff did not produce any other evidence to show that those whom he had purportedly acquired such rights from had lawfully created such rights. There was no evidence shown to me by the plaintiff to prove that the deceased persons had bequeathed or passed on their purported rights to the 'sellers' and that they had the legal authority or capacity from the people who had allegedly created such rights to sell the same to the plaintiff.

[25] He had also relied on the evidence provided by his department to reject the plaintiff's claims. The person who had provided the departmental evidence is DW2 (David Laeng, Land Officer, Lands & Surveys, Miri Division). At the material time he was the assistant settlement officer at the Lands and Surveys Department, Kuching Division. His view is that the plaintiff had failed to prove that he has native customary rights on the 51 parcels of land. The reason for his view is premised on his study of the 1948 and 1976 aerial photographs which, in his view, showed that there was minimal shifting cultivation in the area claimed by the plaintiff and the

reason was that this was due to the ecological nature of the area which consisted mainly of Kerangas and Mangrove Forest, that is, sandy soil of poor nutritional value.

THE LAW

[26] There is little doubt that the plaintiff's case is premised on s 2(a) of the Land Code (Cap 81) 1958 which defines 'native customary land' to mean:

(a) land in which native customary rights, whether communal or otherwise, have lawfully been created prior to the 1 January 1958, and still subsist as such.

[27] In view of the recent Federal Court decision in *Superintendent of Lands & Surveys Miri Division & Anor v Madeli bin Salleh (suing as the administrator of the estate of the deceased, Salleh bin Kilong)* [2008] 2 MLJ 677; [2007] 6 CLJ 509, it is now settled law that common law of Malaysia recognises native customary title. This is what the Federal Court through the judgment of Arifin Zakaria FCJ (as he then was, now CJM) said:

> [21] The learned state attorney general vehemently contended that *Adong* and *Nor Anak Nyawai* should not be followed because they were decisions rooted upon the Australian case of *Mabo (No 2)*, an authority for the proposition that the common law of Australia which recognises a form of 'native titles' and the Canadian case of *Calder v AG of British Columbia* which held that the 'common law categorically recognised native rights over land'.
>
> [22] With respect, we are of the view that the proposition of law as enunciated in these two cases reflected the common law position with regard to native titles throughout the Commonwealth. And it was held by Brennan J, Mason CJ and McHugh J, concurring, in *Mabo (No 2)* that by the common law, the Crown may acquire a radical title or ultimate title to the land but the Crown did not thereby acquire absolute beneficial ownership of the land. The Crown's right or interest is subject to any native rights over such land. They adopted the view of the Privy Council in *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399, where the Privy Council in an appeal from the Supreme Court of Nigeria held that the radical title to land held by the White Cap Chiefs of Lagos is in the Crown, but a full usufructuary title vests in a chief on behalf of the community of which he is head. That usufructuary title was not affected by the cession to the British Crown in 1861; the system of Crown grants must be regarded as having been introduced mainly, if not exclusively, for conveyancing purposes. At p 407 Viscount Haldane observed:
>
> > In the light afforded by the narrative, it is not admissible to conclude that the Crown is generally speaking entitled to the beneficial ownership of the land as having so passed to the Crown as to displace any presumptive title of the natives. In the case of *Oduntan Onisiwo v Attorney-General of*

A *Southern Nigeria (2)*, decided by the Supreme Court of the colony in 1912, Osbourne CJ laid down as regards the effect of the cession of 1861, that he was of the opinion that 'the ownership rights of private landowners, including the families of the Idejos, were left entirely unimpaired, and as freely exercisable after the cession as before'. In this view Their Lordships concur. A mere change in sovereignty is not to be presumed as meant to disturb rights of private owners; and the general terms of a cession are prima facie to be construed accordingly. The introduction of the system of Crown grants which was made subsequently must be regarded as having been brought about mainly, if not exclusively, for conveyancing purposes, and not with a view to altering substantive titles already existing. No doubt questions of difficulty may arise in individual instances as to the effect in law of the terms of particular documents. But when the broad question is raised as to what is meant by the provision in the Public Lands Ordinance of 1903, that where the lands to be taken are the property of a native community, the head chief may sell and convey it, the answer must be that he is to convey a full native title of usufruct, and that adequate compensation for what is so conveyed must be awarded for distribution among the members of the community entitled, for apportionment as the native council of the district, with the sanction of the governor, may determine. The chief is only the agent through whom the transaction is to take place, and he is to be dealt with as representing not only his own but the other interests affected.

[23] We are conscious of the fact that in this case we are dealing with individual right not communal right, but in our view the principle applicable is the same.

[28] What concerns the court now is whether the plaintiff had proved that he has NCR in the 51 parcels of land. Before I deal with the evidence I should set out what I think is the correct approach in dealing with proof of NCR. Kirby P (as he then was) sitting as the president of the Court of Appeal of the New South Wales Supreme Court in *Mason v Tritton* (1994) 34 NSWLR 572 at p 588 observed that:

> In the nature of aboriginal society, their many deprivation and disadvantages following European settlement of Australia and the limited record keeping of the earliest days, it is next to impossible to expect that aboriginal Australians will ever be able to prove, by record details, their presence genealogy back to the time before 1788. In these circumstances, it would be unreasonable and unrealistic for the common law of Australia to demand such proof for the establishment of a claim to native title. The common law, being the creation of reason, typically rejects unrealistic and unreasonable principles.

[29] In *Delgamuukw v British Columbia* [1997] 3 SCR 1010, Lamer CJ had this to say on the appropriate approach in dealing with proof of aboriginal claims and I quote:

In cases involving the determination of aboriginal rights, appellate intervention is also warranted by the failure of a trial court to appreciate the evidentiary difficulties inherent in adjudicating aboriginal claims when, applying the rules of evidence and, second interpreting the evidence before it. As I said in *Van der Peet* at para 68:

> In determining whether an aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive aboriginal culture, a court should approach the rule of evidence, to interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law tots case.

The justification for this special approach can be found in the nature of aboriginal rights themselves. I explained in *Van der Peet* that those rights are aimed at the reconciliation of the prior occupation of North America by distinctive aboriginal societies with the assertion of Crown sovereignty over Canadian territory. They attempt to achieve that reconciliation by 'their bridging of aboriginal and non aboriginal cultures' (at para 42). Accordingly 'act must take into account the perspective of the aboriginal people claiming the right … while at the same time taking into account the perspective of the common law' such that 'true reconciliation will, equally, place weight on each' (at paras 49 and 50).

In other words, although the doctrine of aboriginal rights is a common law doctrine, aboriginal rights are truly *sui generis*, and demand a unique approach to the treatment of evidence which accords due weight to the perspective of aboriginal peoples. However, that accommodation must be done in a manner which does not strain' the Canadian legal and constitutional structure' (at para 49). Both the principles laid down in *Van der Peet* — first that trial courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims, and second, that trial courts must interpret that evidence in the same spirit — must be understood against this background."

[30] Similar sentiments can be seen in the local case of *Hamit bin Matusin & Ors v Superintendent of Lands & Surveys & Anor* [1991] 2 CLJ 1524, where Haidar bin Mohd Nor J (as he then was) had at p 1526 (para G right) said:

In respect of native custom, s 48 of the Evidence act 1950 provides:

> 48 When the court has to perform opinion as to the existence of any general custom or right, the opinions as to the existence of such custom or right of persons who would be likely to know of its existence, if it existed, are relevant.

Cross on Evidence (Australia 3rd Ed) listed four ways in which the existence of customs or usage may be proved. One of these four methods which is relevant to the present actions is stated as follows:

A The first method consists of the testimony of a witness who deposes, from his own personal knowledge, to the actual existence of custom or usage. He states that he is well aware of the facts that lessees in a given locality have been in the habit of removing 'way going crops' that is crops grown by the tenant before the termination of his lease or of any other custom or usage. The evidence may be B based on observation of many instances, and it may sometimes be based on reputation or hearsay.

[31] Bearing in mind the above principles, I now examine the evidence. To C determine whether the original claimants possess NCR over the 51 parcels of land requires me to examine the customs and practices of the Malays in the area of Kampung Loba. The starting point of my examination must be the Transfer Agreement of 1841 between Pangeran Muda Hassim of Brunei and James Brooke which in para II states as follows:

D Moreover James Brooke Esquire undertakes that the laws and customs of the Malays of Sarawak shall forever be respected since the country of Sarawak has hitherto been subject to the government of the Sultan of Brunei the Pangeran Muda and Malayan rajas.

E **[32]** In view of the above, there can be no doubt that the Malay customs in Sarawak must be given recognition and this is not disputed by the defendants. However it is the defendants' submission that there is no evidence in court that the alleged Malay customary practice of 'cari makan' F and 'serah' has been given legal effect by the laws of Sarawak. In support of this submission counsel for the defendants refers to s 2 of the Land Code which defines 'customary law means a custom or body of customs to which the law of Sarawak gives effect'. This can be seen from the defendant counsel's line of cross-examination of PW5 which I quote:

G Q12: Can you explain what are 'the Malays' native customary rights over land', particularly how such rights may be created or surrendered, and identify the source or basis of your explanation or answer?

A12: These are land held by the Malay by customary practice. They are created H through our Malay customary practice and may be surrendered by our Malay customary practice as well.

Q13: Is there any authority in Sarawak which had provided rules or has codified in writing, Malay native customary rights over land? How different is that from 'native customary rights' as recognised under section 66 of the Land Settlement I Ordinance and/or section 5 of the Land Code (Cap 81) of Sarawak.

A13: I am sure there are rules and laws safeguarding Malay native customary rights over land. I have been told about section 66 of the Land Settlement Ordinance and section 5 of the Land Code, I think the sections are not conclusive about how native customary rights may be acquired.

Q14: I refer to paragraphs 7 and 8 of PW5. Can you confirm whether such a Malay custom is recorded in any book or publication as being recognized, and if so, identify the book or publication? A

A14: I am sure there are in writing, such as the section 66 of the Land Settlement Ordinance and section 5 of the Land Code referred to earlier. However, I cannot read and I don't have such publications or books. B

Q15: Do you consider yourself an expert on Malay adat? If yes, kindly inform the Court of your qualifications or basis upon which you claim to be such an expert.

A15: I am not an expert, but I certainly know about the customs and customary practice of my community. After being appointed as a Penghulu in 1980, I have been adjudicating and resolving matters concerning the Malay community, and amongst members of the Malay community, particularly those in the area of my jurisdiction. C

[33] Since PW5 could not show to the court that there is such written law, it was submitted by the defendants that the just mentioned customary practice cannot be recognised by the court. With respect to counsel for the defendants, the phrase 'law of Sarawak' cannot mean only written law. In my view it also means common law as developed by the courts from time to time. This was what happened in the ground breaking decision of *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 6 MLJ 241 where Ian Chin J gave legal effect to the Iban customary practice of 'pemakai menoa' which was upheld by the Court of Appeal. What the common law recognises is succinctly set out by Mohd Noor Ahmad J in *Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors* [2002] 2 MLJ 591; [2002] 2 CLJ 543 at p 565: D E F

The Privy Council had cautioned against interpreting native title by reference to the English land law principles (at p 403) and in *Mabo No 2* Brennan J administered the same caution (at p 29). Accordingly, the Privy Council relied upon a report on the character of the tenure of land among the native communities in West Africa which stated that all members of the native community had an equal right to the land although the headman or the head of the family had charge of the land and in loose mode of speech is sometimes called the owner who held the land for the use of the community or family and the land remained the property of the community or family. The same can be said of the character of land tenure and use amongst the Temuan people based on the facts as found. Further, the character of proprietary interest of the aboriginal people in their land as an interest in land and not merely an usufructuary right can be gathered from the following features of native title as decided by the courts: G H

(a) it is a right acquired in law and not based on any document of title (see the *Calder* case, followed in the *Adong* case at p 428F); I

(b) it does not require any conduct by any person to complete it nor does it depend upon any legislative, executive or judicial declaration (see Brennan CJ in *The Wik Peoples v The State of Queensland & Ors* (1996) 187 CLR 1

('The Wik Peoples case') at p 84, followed in the Malaysian case of *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 2 CLJ 769 at p 780);

(c) native title is a right enforceable by the courts (see Brennan CJ in the *Wik Peoples* case at p 84);

(d) native title and interest in aboriginal land is not lost by colonisation, instead the radical title held by the sovereign becomes encumbered with native rights in respect of the aboriginal land (see *Mabo No 2*, headnotes at p 2);

(e) native title can be extinguished by clear and plain legislation or by an executive act authorised by such legislation but compensation should be paid (see *Mabo No 2*, headnotes at p 3); and

(f) the aboriginal people do not become trespassers in their own lands by the establishment of a colony or sovereignty (see *Ward & Ors (on behalf of the Miriuwung and Gajerrong People) & Ors v State of Western Australia & Ors* (1998) 159 ALR 483 at p 498 lines 43–45).

The aforesaid principles of native title were adopted in the current leading cases on the subject in Australia and Canada viz *Mabo No 2*, *The Wik Peoplescase, and Delgamuukw v The Queen in right of British Columbia et al; First Nations Summit et al, Interveners* (1997) 153 DLR (4th) 193 ('the *Delgamuukw* case') which hold that the aboriginal people's rights included an interest in the land and not merely an usufructuary right. The position is the same in the United States of America from the time of the case of Johnson and *Graham's Lessee v William M'Intos* [1823] 21 US 681 at p 688 where Marshall CJ said:

> They (Indian tribes or nations) were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion.

[34] Apart from the common law, the Federal Constitution accords recognition to NCR wherein art 160(2) defines law to include 'custom or usage having the force of law in the Federation or any part thereof'.

[35] Reverting back to the issue at hand and that is, has the plaintiff on the balance of probability proved that the original claimants had NCR in the 51 parcels of land?

[36] I have earlier set out the plaintiff's case and the various witnesses he called to testify to corroborate his evidence on the Malay Practice of 'cari makan'. There is of course no formal record of this practice and what the court is confronted is the oral evidence of the witnesses. The evidence of PW1, which I have set out earlier, can be said to be self serving as he is the plaintiff in this case. The same could be said for PW3, PW4 and PW6 as they had surrendered their NCLs to the plaintiff and that surrender is the subject of this suit. The corroborative value of their evidence is of course limited.

What amounts to good corroborative evidence is defined by Raja Azlan Shah FJ (as His Highness then was) in *Karthiyayani & Anor v Lee Leong Sin & Anor* [1975] 1 MLJ 119 as follows (at p 120):

> In my judgment, the finding of the learned judge shows that certain salient features of this aspect of the evidence were missed or were not properly appreciated. It is settled law that a person cannot corroborate himself but it would appear that s 157 of the Evidence Act enables a person to corroborate his testimony by his previous statement. The section adopts a contrary rule of English jurisprudence by enacting that a former statement of a witness is admissible to corroborate him, if the former statement is consistent with the evidence given by him in court. The rule is based on the assumption that consistency of utterance is a ground for belief in the witness's truthfulness, just as inconsistency is a ground for disbelieving him. As for myself, although the previous statement made under s 157 is admissible as corroboration, it constitutes a very weak type of corroborative evidence as it tends to defeat the object of the rule that a person cannot corroborate himself. In my opinion the nature and extent of corroboration necessary in such a case must depend on and vary according to the particular circumstances of each case. What is required is some additional evidence rendering it probable that the story of the witness is true and that it is reasonably safe to act upon it. *If a witness is independent, ie, if he has no interest in the success or failure of a case and his evidence inspires confidence of the court, such evidence can be acted upon. A witness is normally to be considered independent unless he springs from sources which are likely to be tainted*. If there are circumstances tending to affect his impartiality, such circumstances will have to be taken into account and the court will have to come to a decision having regard to such circumstances. The court must examine the evidence given by such witness very carefully and scrutinise all the infirmities in that evidence before deciding to act upon it.
>
> The nature and extent of corroborative evidence is a factor which should have been weighed by the learned judge. But as far as I can see, he did not mention it. (Emphasis added.)

[37] In my view, we find such independent evidence in PW2 and PW5. PW2 had not shown any interest in the outcome of the case. Neither has it been shown that he had any motive to be bias towards the plaintiff. Furthermore he was appointed the penghulu for the Loba Rambungan by the resident of Kuching division from 1995–2002 succeeding his father. Apart from holding that position he was also a councilor with the Majlis Perbandaran Padawan which covered the area of Loba Rambungan. His evidence in substance confirmed the testimony of PW1 and, of importance, his confirmation that the plaintiff had executed the 'Surat Perjanjian Menyerah Tanah Termuda' with the NCL owners after the plaintiff had confirmed the ownership with the late Penghulu Sadam bin Hashim and the late Ketua Kaum Bujang bin Hassan. No evidence was produced by the defendants to rebut such contention. Also of importance is his confirmation

that the Malay practice of 'cari makan' is a Malay custom. This is what he said in para 10 of his statement and I quote:

> According to our Malay *adat* or custom, the pioneer or first person that occupy an area for farming or planting of crops or fruit trees or generally for 'cari makan' (foraging the land for food or generally use the land for his livelihood) would have a claim or right over the said land. After his death, any of the children may inherit the right over the said parcel of land, which is commonly referred to as native customary land (NCL). This is because that land was acquired by virtue of our Malay native custom. This is because that land was acquired by virtue of our Malay native custom. Such NCL may be sold of and/or the right therein, commonly referred to as native customary rights (NCR) can be transferred to another person or another native who may not be Malay by race but a native of Sarawak.

[38] His testimony, of course, stems from his knowledge, through his experience and various courses organised by the state government. His experience comes from living as a Malay, knowledge passed on from his father and, of course, from his on the job as a penghulu.

[39] Though PW2 is not called by the plaintiff as an expert witness, his so called 'claimed knowledge' had not been disputed by the defence. Hence one can say that his evidence has been unchallenged. PW5, whom I said earlier can be considered as an independent witness, stated at the time of his testimony that he is the longest serving penghulu in the Kuching division as he had been appointed since 1 June 1980. As the penghulu he had jurisdiction over the Malay communities in Kuching division. The pertinent parts of his statement are these:

(a) I am familiar with the traditions, customs and customary practice of the Malay communities in the Kuching division. I have knowledge of the Malays' customary rights including customs and customary practice pertaining to land, mainly from the briefings organised by government departments including the Lands & Surveys Department, District Office and Resident.

(b) Generally, the Malays in and around Kuching are mostly settled or lived by the coastal areas and/or along riverbanks usually the lower part of the river closer to the sea. This is because traditionally we have been fishermen plying the seas and river mouth to sustain our livelihood. Besides fishing, we are also farmers planting wet and dry *padi*, *pokok bandong* or *ubi kayu* (tapioca) where the land is suitable.

(c) For the Malay communities, the land surrounding their *kampongs* including the riverbank and swampy areas are the main sources of our livelihoods. They forage the swampy areas and along the riverbanks for food such as *lokan*, prawn, crabs, fish, *tekoyong* or *siput* (a kind of edible snails) and the like. From the *nipah* palm, which grows freely at the

river banks, we extract its nectar locally referred to as 'gula apung' for sugar, 'cuka apong' (vinegar), 'garam apong' (salt). The *nipah* leaves are weaved into roofing material for houses and huts and also mats. For generations, the Malay communities have derived benefits from the *nipah* palm, for food and cash income. Since I was 13 years old, I followed my father to work on our land to harvest the 'gula apung', 'cuka apong', 'garam apong' and make use of the other parts of the *nipah* palm which are useful and valuable to us. Other useful trees to the Malay communities, from the land they derived food and income, are the *nibung* trees which is used for poles and/or posts and floors of houses, as this tree is hard and durable, and *bako* trees useful for piling.

(d) I have knowledge of the 'Surat Perjanjian Menyerah Tanah Temuda'. A 'Surat Perjanjian Menyerah Tanah Temuda' is used when a party surrenders and or transfers his or her customary rights over his or her native customary land to another native person. It is a requirement of the Lands & Surveys Department that such 'Surat Perjanjian Menyerah Tanah Temuda' must be signed by the penghulu as the ketua adat of the area to verify and confirm the existence of customary rights of the 'penyerah' (transferor).

(e) In or about 1993, the state government had acquired land in and around Sungai Tapang, Sejingkat for the establishment and or creation of the Sejingkat free trade zone industrial estate. I was requested and had rendered my service to assist the Lands & Surveys Department in determining the proprietors and owners of the native customary land to ensure that compensation monies are paid to the rightful persons.

(f) The 'Surat Perjanjian Menyerah Tanah Temuda' was one of the documents which I relied on to ascertain the rightful claimants proprietors and owners of the native customary land. These 'Surat Perjanjian Menyerah Tanah Temuda' were produced and were accepted by the Lands & Surveys Department.

[40] Counsel for the defendants however submitted that none of the 'sellers' were the persons who had created any rights to the land and since there is no direct evidence from the sellers as to how and when the felling of jungle was done prior to 1 January 1958, the plaintiff had failed in proving his case. Counsel for the defendants also attacked the plaintiff's evidence as hearsay and ought to be disregarded by this court. With respect, hearsay evidence and opinion evidence are relevant evidence in a claim for customary rights as held by Haidar J in *Hamit bin Matusin & Ors v Superintendent of Lands & Surveys & Anor*. In this case, the claim for NCR by the plaintiff in substance relied on the verification of the late Penghulu Sadam bin Hashim, the late Ketua Kaum Bujang bin Hassan and PW2. PW2 of course is the only surviving trio but it is not disputed that PW2 had personal knowledge as to

the certification of the 51 parcels of land. At the time of his father's illness PW2 accompanied the plaintiff to see the late Ketua Kaum Bujang bin Hassan to determine whether the sellers had NCR. In my view I cannot think of any other qualified persons who is in a better position to make such certification other than the late Penghulu Sadam, Ketua Kaum Bujang and PW2 as they were intimately involved in the area and were entrusted with the affairs of the Malay communities in that area. As stated earlier, their knowledge had not been challenged which can be easily done by calling another penghulu or someone who has knowledge of the Malay custom to rebut their testimonies. Why this was not done mystify the court as the evidence of PW2 and PW5 were corroborative evidence of immense value if not rebutted. PW5 testified that he is the penghulu and surely as a government appointee it would not be his interest to testify against the government which makes his evidence more credible. I say the same for PW2 who was also a government appointee as penghulu and councilor of Majlis Perbandaran Padawan. The plaintiff's claim of NCR over the 51 parcels of land is also corroborated by the issuance of notification for extinguishment of NCR by the defendant. It is illogical for the defendants to do so if they did not concede that there is in existence NCR in the 51 parcels of land. Furthermore there is no other claim for NCR apart from the plaintiff's claim. As for the aerial photographs used by the defendants to rebut the plaintiff's claim, they are of little use as there is no ground survey conducted bearing in mind that it is the testimony of DW2 that there is element of NCR in the claimed area. The use of the aerial photography is to show that there was no shifting cultivation but this is neither here nor there as the plaintiff had stated in evidence that the Malay practice of 'cari makan' did not involve shifting cultivation. In any event, the defendants have not established the authenticity of the aerial photograph as they had not called the relevant witness or witnesses to testify as to how and when the aerial photograph was taken. The first step which needs to be taken to establish the authenticity of any document in court must be to call the maker of it or if he or she is not available due to the age of the document, facts surrounding as to how the document came into existence must be led in evidence and established. This is basic principle in respect of the rule against hearsay. Hence as this first step had not been taken by the defendants in respect of the aerial photograph, any reliance or interpretation of the aerial photograph is at best suspect.

[41] Further in dealing with claims of NCR by natives, one should start with the premise that natives are not only owners, they also are part of the land. They are the original occupants of the land and that was how they had used the land to live and feed off them from time immemorial. This right of course pre existed any legislation.

[42] For the reasons stated above I am of the view that the plaintiff, on the balance of probability, had proved that the 51 parcels of land are NCL acquired via 'Surat Perjanjian Menyerah Tanah Temuda'.

[43] This brings me to the next sub issue of whether the Malay custom recognises the practice of 'serah'. On this issue counsel for the defendants submitted that the 'serah' issue must be decided by reference to the Land Code, specifically s 5(1) and (2) which prescribed the methods by which NCR may be acquired after 1 January 1958. Counsel for the defendants also referred the court to two cases, namely, *Bisi AK Jinggot @ Hilarion Bisi AK Jenggut v Superintendent of Lands & Surveys Kuching Division & Ors* [2008] 4 MLJ 415; [2008] 1 LNS 245 and *Sapiah binti Mahmud v Superintendent of Lands and Surveys, Samarahan Division & 2 Ors* [2009] MLJU 410 (22–82 Tahun 2003-I). In *Bisi*'s case, the learned judicial commissioner said this:

> (ii) ... In this case, the plaintiff is not alleging that his ancestors were in continuous occupation of the land. On the contrary he says that he has purchased the NCR by way of ordinary sale and purchase agreement. I do not think NCR can be transferred by modern conveyancing instrument of transfer as it could not have been prima facie part of the NCR and/or practice. I agree with the submissions of the first and second defendants that NCR in Sarawak can only be transferred in a limited sense for example by gift or inheritance etc within the community members of the native before any claimant can be showered with the exclusive privileges. That is to say, inter alia, a native from a community residing in south of Sarawak cannot purchase NCR from a native in a community residing in north of Sarawak. The nexus must be within the community and not within the race. For courts to recognise any such transfers it must be legislated. It is not sufficient for the plaintiff to allege such transfers are in vogue and is recognised in practice, without satisfactory evidence adduced in court. The burden of proof lies with the plaintiff and that burden has not been discharged in this case according to law.
>
> (iii) It is also my finding that the plaintiff has not acquired NCR pursuant to the SLC and is this context I agree with the submission of the defendants on this issue.

[44] *Bisi*'s case follows the dicta in *Hamit bin Matusin & Ors v Superintendent & Anor* [1991] 2 CLJ 1524 which held that transfers of NCR land within the same community in particular is permissible if it allowed by custom of the natives. In *Sapiah binti Mahmud*, Linton Albert J adopted the decision of *Sumbang Anak Sekam v Engkarong Anak Ajah* [236] MD 10; [1958] SCR 95 where Lascelles J said:

> Individual customary rights are not transferable by sale or otherwise for value.

[45] I was also referred to the case of *Hj Khalid bin Abdullah v Khalid bin Abg Hj Marzuki & Anor (Kuching Originating Motion No KG3 of 1983)* (reported in pp 177–198 of the Land Cases 1969–1987, published by Lands & Surveys Department), where the parties were evidently Malays and concerned with the transfer of NCR land. Tan Chiaw Thong J held as follows:

> This raises the question as to whether on the date of the execution of the 1981 memorandum of transfer, the registered proprietor was in a position to transfer his customary rights to the applicant. Having regard to the scheme of the Land Code, it seems to me clear that the answer is in the negative. For one thing, there is no provision in that Code for the transfer of such rights from one native to another who is unrelated to him, and for another, the proviso to s 5(2) and the provisions of s 18 of that Code to my mind presuppose that only through personal occupation and usage of any area of unalienated land in accordance with the rights acquired by customary tenure amounting to ownership would such rights be recognised for the purposes of that section. In my view, taking into account the scheme of the Land Code, if it is legitimate for any customary rights to be transferred in the manner and to the extent as indicated in the 1981 memorandum of transfer, there would have been provision in the Land Code permitting this to be done and there is no such provision in that Code.

[46] In discussing this issue, the starting point must be to determine what kind of rights is embodied in a native title. Mokhtar Sidin JCA in *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418 dealt with this issue in the context of the Federal Constitution and this is what he said:

> The plaintiffs' counsel submitted that the rights accorded to the aboriginal people by common law and statutory law are proprietary rights within the ambit of art 13(1) of the Federal Constitution and there is no law to take away these rights without due compensation. The plaintiffs' counsel further submitted that the act of the defendants in taking away the traditional and ancestral funds from the plaintiffs without compensation is unlawful.
>
> However, we need not go into the common law on compensation for our Federal Constitution art 13 covers that situation.
>
> Article 13 states:
>
> > 13 Rights to property
> >
> > (1) No person shall be deprived of property save in accordance with law.
> >
> > (2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.

The plaintiffs' counsel submitted that the rights accorded to the aboriginal people by common law and statutory law are proprietary rights within the ambit of art 13(1) of the Federal Constitution and that when these rights are taken away by the defendants, the plaintiffs should be compensated pursuant to art 13(2).

To answer this question, we have to determine whether the rights accorded to the plaintiffs under common law and statutory law as described earlier are proprietary rights protected by art 13(1), or in other words, do the rights accorded to the plaintiffs fall within the ambit of art 13(1), and which is to be adequately compensated by art 13(2) if compulsorily acquired or used.

The word 'property' appearing in art 13(1) is a legal word and should be accorded its legal meaning. There is a similar provision to our art 13 in the Indian Constitution arts 19(1)(f) and 31. There are numerous Indian constitutional cases which have defined the word 'property' and I rely on the case of *Rabindra Kumar v Forest Officer* AIR 1955 Manipur 49 at pp 53–54 which eloquently sets out the meaning of the word 'property' as used in a constitutional context:

> It has been contended that the petitioner cannot seek any relief under arts 19(1)(f) and 31 of the Constitution for his 'property' right has not been infringed at all. The argument is that the lease dated 24 February 1955, is not a completed contract and it is only a permit and so the petitioner did not acquire any property through it.

I think this contention of the respondents has no force. The words 'property' has been explained in *Corpus Juris*, *Vol 73* p 136 as follows:

> In legal usage 'property' is perhaps the comprehensive word which can be employed and it may signify either the subject matter in which interest exists or it may signify valuable rights and interests protected by law or it may signify both. It is generally recognised that property includes certain rights such as the right of acquisition, possession, use, enjoyment and disposition. In legal usage, the word property is a generic term. According to the authorities on this question it is a term of broad and extensive application and it is also a term of large import with the very broadest and most extensive signification. It is a very comprehensive word having broad and comprehensive and exceedingly complex meanings and is perhaps the most comprehensive of all the terms that can be used.

The word property includes both real and personal property and ordinarily will be construed as meaning both real and personal property. It includes both intangible rights and physical things.

In the strict legal sense, the word property signifies valuable rights or interests protected by law and this is the primary appropriate and broader signification of the term. In modern legal system, property includes practically all valuable rights, the term being indicative and descriptive of every possible interest which a person can have in any and every thing that is the subject of ownership by man and including every valuable interests, it can be enjoyed as property and recognised as such equitable interests as well as legal interests and extending to every species of valuable rights or interests in either real or personal property or in easements, franchises and incorporal hereditaments.

The term comprises also all rights which are incidental to the use, enjoyment and disposition of intangible things, the bare possession, with colour or right of anything of value, the right to be protected in one's possession of a thing or in one's privileges belonging to him as an individual or secured to him as a member for the commonwealth including the right to contest judicially any invasion of that which one possesses or owns.

A The property may reasonably be construed to include obligation rights and other intangible and physical things and thus the word 'property' means not only the thing but also the rights in the physical and corporeal thing which are created and sanctioned by law.

B It is generally recognised that property includes the right of acquisition, the right of dominion, the right of possession, the right of use and enjoyment, the right of exclusion and the right of disposition.

The Federal Court in the case of *Selangor Pilot Association (1946) v Government of Malaysia & Anor* [1975] 2 MLJ 66 at p 69, per Suffian LP said:

C > The language of our art 13 is not identical with, but it certainly approximates to, the language of the Indian art 31 before the 1955 amendment which added the new cl (2A). The absence of a similar clause from our art 13 persuades me to adopt the construction placed on the Indian article by the Indian Supreme Court on the unamended art 31.

D I would therefore agree with the wide interpretation given to proprietary rights under art 13 and hold that the plaintiffs' rights both under common law and statutory law are proprietary rights protected by art 13 of the Federal Constitution.

I will now proceed to examine whether the plaintiffs were deprived of proprietary rights protected by the Federal Constitution art 13(1).

E At the time the defendants entered into an agreement with the Government of the Republic of Singapore and built a dam in the Linggiu valley, the plaintiffs' rights of free access into Linggiu valley and to harvest the fruits of the jungle were unchallenged and recognised in law. It is the building of the dam that brought the plaintiffs' freedom of movement within the Linggiu valley, which is guaranteed by the Federal Constitution art 9(2), to an end and subsequently extinguished the plaintiffs' rights to collect the forest produce which are recognised at common law and statutory law.

F The plaintiffs' statement that the forest was a source of their livelihood was not rebutted by the defendants and neither was there evidence that there was a break in the continuous occupation and traditional connection in the land for their livelihoods.

It has been long recognised under our law that when a person is deprived of any proprietary right under an executive exercise pursuant to powers given by statute, that person must be compensated.

H Hashim Yeop Sani J (as he was then) in the case of *S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors* [1982] 1 MLJ 204 at p 206 said:

I > Article 13(1) in my opinion ensures the sanctity of private property. That clause guarantees the right of any person not to be deprived of his property save in accordance with law which simply means that no one can be deprived of his property merely on the orders of the executive but that he may be deprived of his property only in accordance with law.

I agree with His Lordship.

The plaintiffs have established that they have proprietary rights over the Linggiu valley and that the defendants have deprived them of these rights. It was then up to the defendants to show that they had the right to deprive the plaintiffs of such rights. The defendants have failed to do so.

Since the defendants have failed to establish the right to deprive the plaintiffs of their rights, I will hold that this deprivation without compensation was unlawful. I therefore hold that the plaintiffs are entitled to the compensation in accordance with art 13(2).

The Federal Constitution art 13 supersedes both statutory law and common law and mandates that all acquisition of proprietary rights shall be compensated and that any law made for the compulsory acquisition or use of property without compensation shall be rendered void in accordance with art 4 of the Federal Constitution. I assume that the alienation of the Linggiu valley lands in four titles was done under the National Land Code 1965 but the National Land Code 1965 does not provide for compensation of land acquired. However, the National Land Code 1965 must be read as being subservient to art 13 of the Federal Constitution and where there is no provision for compensation under statutory law, art 13(2) should be read into that statute.

[47] The law of Sarawak provides for compensation to be paid when there is an extinguishment of NCR and hence I had in *Jalang Anak Paran & Anor v Government of the State of Sarawak* [2007] 1 MLJ 412; [2007] 1 AMR 39 held that s 5(3) of Land Code did not contravene the protection accorded by s 13(2) of the Federal Constitution. Section 5(3) of the Land Code reads as follows:

> Any native customary rights may be extinguished by direction issued by the Minister which shall be —
>
> (i) published in the Gazette and one newspaper circulating in Sarawak; and
>
> (ii) exhibited at the notice board of the District Office for the area where the land, over which such rights are to be extinguished is situate, and on the date specified in the direction, the native customary rights shall be extinguished and the land held under such rights shall revert to the Government:
>
> > Provided that where such rights are extinguished in pursuance of this section compensation shall be paid to any person who can establish his claims to such rights in accordance with paragraphs (b) and (c); or other land over which such rights may be exercised may be made available to him with or without the payment of additional compensation whether for disturbance, or for the costs of removal, or otherwise.

[48] It can be said then that the State Government of Sarawak had complied with the Federal Constitution by having s 5(3) in its statute book. And it also can be said that they have also recognised that natives in Sarawak

who had established NCR, have proprietary rights over the land and these rights by implication come within the ambit of the word 'property' in art 13 of the Federal Constitution. What do these proprietary rights entail? Mokhtar Sidin JCA in *Adong bin Kuwau* detailed them as thus:

> Before the introduction of the Torrens land system, these lands were unclaimed land in the present sense but were 'kawasan saka' to the aboriginal people. On the introduction of the Torrens land system, all the kawasan saka became state land but the aboriginal people were given the freedom to roam about these lands and harvest the fruits of the jungle. Some of these lands have been gazetted as forest reserves. The plaintiffs, however, continue to live and/or depend upon this unalienated land. It was not denied that some of them had lived on these lands, and all of them still consider the jungle as their domain to hunt and extract the produce of the jungle just like their forefathers had done.
>
> My view is that, and I get support from the decision of *Calder*'s case and *Mabo*'s case, the aboriginal peoples' rights over the land include the right to move freely about their land, without any form of disturbance or interference and also to live from the produce of the land itself, but not to the land itself in the modern sense that the aborigines can convey, lease out, rent out the land or any produce therein since they have been in continuous and unbroken occupation and/or enjoyment of the rights of the land from time immemorial. I believe this is a common law right which the natives have and which the Canadian and Australian courts have described as native titles and particularly the judgment of Judson J in the *Calder* case at p 156 where His Lordship said the rights and which rights include '... the right to live on their land as their forefathers had lived and that right has not been lawfully extinguished ...'. I would agree with this ratio and rule that in Malaysia the aborigines' common law rights include, inter alia, the right to live on their land as their forefathers had lived and this would mean that even the future generations of the aboriginal people would be entitled to this right of their forefathers.

[49] Whether natives in Sarawak have the right of disposition of NCR land, in my view, must be considered in the context of their customs and traditions together with the Federal Constitution. The reason is simple and that is the Federal Constitution gives protection to NCR. The first of such protection is art 160(2) which defines law to include 'customs or usage having the force of law in the Federation or any part thereof'. What this means is that if, as in this case, the custom of the Malay communities allows disposition of land with NCR among themselves the court is constitutionally bound to protect that custom. This is how Dr Ramy Bulan in her paper titled 'Legal Perspectives On Native Customary Land Rights in Sarawak' puts it at p 151:

> The denial of customs supporting native property rights on the basis that they are different from non native property holding patterns not only violates art 160(2) by failing to recognise customs as part of Malaysian law, it also violates the right of natives to equality before the law, guaranteed by art 8(1) of the Federal

Constitution. The failure to provide for registration of native title and to accord indefeasibility to registered interest could similarly violates art 8(1). A

[50] There is much merit in what Dr Bulan says and I adopt her view. Another article of the Federal Constitution which needs to be taken into account is art 153 the Federal Constitution which grant special status to the Malays and the natives of Sabah and Sarawak. It reads as follows: B

Reservation of quotas in respect of services, permits, etc for Malays and natives of any of the States of Sabah and Sarawak. C

153

(1) It shall be the responsibility of the Yang di-Pertuan Agong to safeguard the special position of the Malays and natives of any of the States of Sabah and Sarawak and the legitimate interests of other communities in accordance with the provisions of this Article. D

(2) Notwithstanding anything in this Constitution, but subject to the provisions of Article 40 and of this Article, the Yang di-Pertuan Agong shall exercise his functions under this Constitution and federal law in such manner as may be necessary to safeguard the special position of the Malays and natives of any of the States of Sabah and Sarawak of such proportion as he may deem reasonable of positions in the public service (other than the public service of a State) and of scholarships, exhibitions and other similar educational or training privileges or special facilities given or accorded by the Federal Government and, when any permit or licence for the operation of any trade or business is required by federal law, then, subject to the provisions of that law and this Article, of such permits and licences. E F

(3) The Yang di-Pertuan Agong may, in order to ensure in accordance with Clause (2) the reservation to Malays and natives of any of the States of Sabah and Sarawak of positions in the public service and of scholarships, exhibitions and other educational or training privileges or special facilities, give such general directions as may be required for that purpose to any Commission to which Part X applies or to any authority charged with responsibility for the grant of such scholarships, exhibitions or other educational or training privileges or special facilities; and the Commission or authority shall duly comply with the directions. G

(4) In exercising his functions under this Constitution and federal law in accordance with Clauses (1) to (3) the Yang di-Pertuan Agong shall not deprive any person of any public office held by him or of the continuance of any scholarship, exhibition or other educational or training privileges or special facilities enjoyed by him. H

(5) This Article does not derogate from the provisions of Article 136. I

(6) Whereby existing federal law a permit or licence is required for the operation of any trade or business the Yang di-Pertuan Agong may exercise his functions under that law in such manner, or give such general directions to any authority charged under that law with the grant of such permits or

licences, as may be required to ensure the reservation of such proportion of such permits or licences for Malays and natives of any of the States of Sabah and Sarawak as the Yang di-Pertuan Agong may deem reasonable; and the authority shall duly comply with the directions.

(7) Nothing in this Article shall operate to deprive or authorise the deprivation of any person of any right, privilege, permit or licence accrued to or enjoyed or held by him or to authorise a refusal to renew to any person any such permit or licence or a refusal to grant to the heirs, successors or assigns of a person any permit or licence when the renewal or grant might reasonably be expected in the ordinary course of events.

(8) Notwithstanding anything in this Constitution, where by any federal law any permit or licence is required for the operation of any trade or business, that law may provide for the reservation of a proportion of such permits or licences for Malays and natives of any of the States of Sabah and Sarawak; but no such law shall for the purpose of ensuring such a reservation —

(a) deprive or authorise the deprivation of any person of any right, privilege, permit or licence accrued to or enjoyed or held by him; or

(b) authorise a refusal to renew to any person any such permit or licence or a refusal to grant to the heirs, successors or assigns of any person any permit or licence when the renewal or grant might in accordance with the other provisions of the law reasonably be expected in the ordinary course of events, or prevent any person from transferring together with his business any transferable licence to operate that business; or

(c) where no permit or licence was previously required for the operation of the trade or business, authorise a refusal to grant a permit or licence to any person for the operation of any trade or business which immediately before the coming into force of the law he had been bona fide carrying on, or authorise a refusal subsequently to renew to any such person any permit or licence, or a refusal to grant to the heirs, successors or assigns of any such person any such permit or licence when the renewal or grant might in accordance with the other provisions of that law reasonably be expected in the ordinary course of events.

(8A)Notwithstanding anything in this Constitution, where in any University, College and other educational institution providing education after Malaysian Certificate of Education or its equivalent, the number of places offered by the authority responsible for the management of the University, College or such educational institution to candidates for any course of study is less than the number of candidates qualified for such places, it shall be lawful for the Yang di-Pertuan Agong by virtue of this Article to give such directions to the authority as may be required to ensure the reservation of such proportion of such places for Malays and natives of any of the States of Sabah and Sarawak as the Yang di-Pertuan Agong may deem reasonable; and the authority shall duly comply with the directions.

(9) Nothing in this Article shall empower Parliament to restrict business or trade solely for the purpose of reservations for Malays and natives of any of the States of Sabah and Sarawak.

(9A) In this Article the expression 'natives' in relation to the State of Sabah or Sarawak shall have the meaning assigned to it in Article 161A.

(10) The Constitution of the State of any Ruler may make provision corresponding (with the necessary modifications) to the provisions of this Article.

[51] Our forefathers in their wisdom had seen fit that such special status be accorded to the indigenous people of the country and one of the reasons for such recognition is to maintain and promote the economic livelihood of these special groups. Hence it is incumbent on the courts to ensure that such privilege and rights are enhanced. In the case at hand the issue is whether members of the Malay communities can transfer their NCR in their land to members of same communities. It is common sense that if natives are allowed to dispose of their NCL within their communities, it would automatically enhance their value and improve the natives' economic livelihood. This would promote the ideals behind the constitutional special status of the natives. I see no reason why natives should not possess such rights of disposition of their NCL as non-natives have in titled land. Furthermore it would not affect the rights of non-natives as they could not in law hold NCL. Not to allow such disposition even among their own communities would in effect make their NCL worthless which cannot be seen as promoting the well being of natives in the country when they have been granted special status under the Federal Constitution.

[52] Counsel for the defendants had submitted that the plaintiff's intention 'to acquire the land to open up vast tract of land for cultivation and farming' runs contrary to Secretariat Circular No 12 of 1939, the relevant parts reads as follows:

> It is the aim of the government to record and protect these customary rights and to protect the various communities from impoverishing themselves by disposing lightly of their rights to others, whether alien or native.
>
> No community or individual may hold up land in excess of requirements.

[53] With respect, the circular issued in 1939 does not have any relevance whatsoever now for the simple reason that it was a circular issued pre Merdeka. In any event the society as it existed in 1939 in Sarawak is different from the society which exists today. The thinking of the legal profession, which includes the judiciary, has also changed to reflect the change in society. This change has seen the courts in this country recognising the relevance of

international human rights protection to native title in Malaysia. In *Adong*'s case Mokhtar Sidin JCA recognises this and this is what he said:

> Of late, aboriginal peoples' land rights — or generally what is internationally known as native peoples' rights — has gained much recognition after the Second World War, with the establishment of the United Nations of which the UN Charter guarantees certain fundamental rights. Native rights have been greatly expounded on by the courts in Canada, New Zealand and Australia restating the colonial laws imposed on native rights over their lands. It is worth noting that these native peoples' traditional land rights are now firmly entrenched in countries that had and/or are still practicing the Torrens land law — namely Canada, New Zealand and Australia — where special status have been enacted or tribunals set up in order for natives to claim a right over their traditional lands.

[54] The Federal Court also, as pointed out earlier, has in *Madeli* case acknowledged the rule that the Crown's acquisition of sovereignty did not affect indigenous rights held pursuant to custom as the Crown did not acquire absolute beneficial ownership of land but instead, obtained radical title, subject to any indigenous rights over land.

[55] Similarly for the same reason, the principle of Lascelles J in *Sumbang Anak Sekam v Engkarong Anak Ajah* cannot be taken as good law. In fact the plaintiff's intention to acquire a 'vast tract of land' should be commended as if he were to succeed in his venture it would uplift his economic well being and in turn uplift the economic well being of the Malay community in that area. Why that should be stopped by law is beyond my comprehension. The non-natives, in their zeal to succeed in the business world, look for such opportunity everyday and they face no impediments. Again I cannot see the value or the logic of such discrimination.

[56] For reasons stated above, I am of the view that natives in Sarawak may dispose their NCL among the natives themselves for value provided that there is no prohibition to do so in the custom of that native community. In the present case no such prohibition has been proved. In fact, on the contrary, there is ample evidence to support that the customary practice of 'serah' is part of the Malay culture. Such evidence can be seen in this part of the cross-examination:

> Q14: Refer witness to Q & A (72) PW1B. You alleged that it has always been 'a practice for the Malay custom to surrender and serah the land to another. Is there any record to prove that such practice exists?
>
> A14: Yes. see my answers to questions for cross-examination (PW1-B), my answers to Question No.11 and the enclosures referred to therein. Surat Perjanjian Menyerah Tanah Temuda (MRK-4(e) dated 17.08.87 between myself and Hj Jeraiee bin Seylang. I also serah (surrender) 4 pieces of my NCR land to the

government (land situated at Sungai Bayor/Sungai Kuap, Samarahan as per attached Sarawak Government payment voucher or Payment Advice Form No. 12 21247 dated 28.11.1996 amounting to RM306,893.00. The copies of the said Payment Advice Form and the related documents are now shown to me marked as Exhibits 'MRK-5 (a)', 'MRK-5 (b)', 'MRK-5 (c)' and 'MRK-5 (d)' and annexed hereto. (emphasis added.)

(Exhibits MRK-5(a) to (d) are marked as Exhibit P4(a) to (d))

Q15: You mentioned it was 'a practice'. Do you know if this practice is recognised in the Land Code as a mode of acquiring native customary rights over land?

A15: I know the practice is part of our 'Malay Adat' and also recognized by the Lands & Surveys especially on acquiring or 'serah' NCR land. Even the document of acquiring NCR land by the Lands & Surveys also mentioned the word 'SURRENDER OF NATIVE CUSTOMARY RIGHT' and surrender is 'SERAH'. So both parties recognized the practice of 'Serah'. Exhibits 'MRK-5 (a)', 'MRK-5 (b)', 'MRK-5 (c)' and 'MRK-5 (d)' are evidence that the practice is recognised by the Government. I have other evidence as well. On 03.01.1993, Ismail B Saeli 'serah' his NCR land at Ulu Sg. Jernang, Binyu, Kuching (now Samarahan) to me. I later, on 17.10.1995, 'serah' the land to the state government. The transactions were completely legal and recognised by the Lands and Surveys and the state government. I enclose herein copies of the relevant papers with the Payment Advice Form No. 11 20005 dated 26.10.1995 amounting to RM185,725.00 now shown to me marked as Exhibits 'MRK-6 (a)', 'MRK-6 (b)', 'MRK-6 (c)' and 'MRK-6 (d)' and annexed hereto. I have more of these documents as Exhibits 'MRK-5 (a)', 'MRK-5 (b)', 'MRK-5 (c)' and 'MRK-5 (d)' and Exhibits 'MRK-6 (a)', 'MRK-6 (b)', 'MRK-6 (c)' and 'MRK-6 (d)'. I also have a copy of the compilation of 'A Paper On The Concept Of 'Serah' Over Native Customary Land In The Context Of The Statue Law And Adat' by the late James Jabing, Assistant Settlement Officer, Kuching Division. My copy is not very clear, but I would like to produce duplicates of it and marked the Paper as Exhibit 'MRK-7'. Inside the papers, community leaders, including renowned Malay leaders, talked about the concept of 'serah' and that it is part of our customary practice. I am sure that the Lands and Surveys Department Kuching has a clearer copy of this Paper.

(Exhibits MRK-5(a) to (d) are marked as Exhibit P4(a) to (d))

(Exhibits MRK-6(a) to (d) are marked as Exhibit P5(a) to (d))

[57] As correctly pointed out by counsel for the plaintiff, the defendants have also seen fit not to rebut the documentary evidence which leads me to one conclusion and that is 'serah' is part of the customary practice of the Malay. As I said earlier the court is duty bound to protect such custom.

ISSUE NO 3

Whether, in the circumstances, the first defendant was right in law to reject the plaintiff's claims to NCR over the 51 parcels of land or any part thereof?

[58] For reasons given in issue No 2, I find that the first defendant was wrong in rejecting the plaintiff's claims to NCR over the said lands.

ISSUE NO 4

Whether the plaintiff is entitled to aggravated and exemplary damages?

[59] The circumstances in which a court would award exemplary and aggravated damages are as set out in the High Court decision in *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352; [1994] 1 CLJ 19 at 62d (right column) where the court states:

> In a famous passage in his judgment in *Rookes v Barnard* [1964] AC 1129 Lord Devlin, with the unanimous approval of all his brethren reviewed the law and laid down that exemplary damages could only be awarded in three categories of cases, namely, oppressive action by officers of the Crown; secondly, cases where 'a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk', and thirdly, where statute expressly authorised it.
>
> …
>
> In *Cassel & Co v Broome* [1972] 1 All ER 801 Lord Morris explained the ambit of the expression 'calculated to make a profit' used by Lord Devlin in *Rookes v Barnard*. This is how he put it at p 843:
>
> > There may be exemplary damages if a defendant has formed and be guided by the view that, though he may have to pay some damages or compensation because of what he intends to do, yet he will in some way gain (for the category is not confined to money making in the strict sense) or may make money out of it, to an extent which he hopes and expects will be worth his while. I do not think that the word 'calculated' was used to denote some precise balancing process. The situation contemplated is where someone faces up to the possibility of having to pay damages for doing something which may be held to have been wrong but where nevertheless he deliberately carries out his plan because he thinks that it will work out satisfactorily for him.

[60] It is my view that the plaintiff had not shown that the defendants had conducted themselves in a manner as described in the Supreme Court judgment and accordingly there is no reason for me to award exemplary or

aggravated damages to the plaintiff.

ORDERS OF THE COURT

[61] For all the reasons stated above I make the following orders:

(a) a declaration that the plaintiff has acquired native customary rights (NCR) over the said 51 parcels of land;

(b) that the second defendant pays the plaintiff a compensation amount to be assessed in accordance with the provisions of the Land Code relating to extinguishment of native customary rights;

(c) interest to be charged on the assessed compensation amount at the rate of 8%pa from the date of extinguishment notices to the date of judgment and realisation; and

(d) costs of this action to be taxed unless agreed to the plaintiff.

Plaintiff's application allowed with costs.

Reported by Kohila Nesan